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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDRIC HABERMAN, *et al.*,
Petitioners,

v.

CHEMICAL BANK and WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Of Counsel:

Robert H. Jaffe
Jaffe & Schlesinger, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081

Christopher Kane
David R. Lord
Ferguson & Burdell
29th Floor
One Union Square
Seattle, Washington 98101

Ernest C. Matthews, IV
Thoreson, Yost, Berry & Matthews
825 Peoples National Bank Building
1415 Fifth Avenue
Seattle, Washington 98171

Myer Feldman
Counsel of Record

Robert L. Deitz
Edward J. Tolchin
Ginsburg, Feldman and Bress, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioners

March 6, 1984

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QUESTION PRESENTED

Does the denial by a state court of a timely motion to intervene in a lawsuit that is adjudicating the property interests of those seeking intervention -- when no other party can fully represent those interests -- deny due process of law?

PARTIES

Petitioners -- proposed Plaintiff-Intervenors below -- are Fredric Haberman, Claude Purvis, Nerow Cheng, Ted R. Pape, Aubrey L. Moss, and John H. Biggs.

Respondents Chemical Bank and the Washington Public Power Supply System were appellants below.

Respondents below and in this Court are Public Utility District No. 1 of Benton County, Washington; Central Lincoln People's Utility District, Oregon; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Clatskanie People's Utility District,

Oregon; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No.

1 of Pend Oreille County, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of Snohomish County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 10, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centralia, Washington; City of Drain, Oregon; City of Ellensburg, Washington; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port

Angeles, Washington; City of Richland, Washington; City of Rupert, Idaho; City of Springfield, Oregon; City of Steilacoom, Washington; City of Sumas, Washington; City of Tacoma, Washington; Alder Mutual Light Company, Washington; Benton Rural Electric Association, Washington; Big Bend Electric Cooperative, Inc., Washington; Blachly-Lane Electric Cooperative Association, Oregon; Central Electric Cooperative, Inc., Oregon; Clearwater Power Company, Idaho; Columbia Basin Electric Cooperative, Inc., Oregon; Columbia Rural Electric Association, Inc., Oregon; Consumers Power, Inc., Oregon; Coos-Curry Electric Cooperative, Inc., Oregon; Douglas Electric Cooperative, Inc., Oregon; Elmhurst Mutual Power and Light Company, Washington; Fall River Rural

Electric Cooperative, Inc., Idaho; Glacier Electric Cooperative, Montana; Hood River Electric Cooperative, Oregon; Idaho County Light & Power Cooperative Association, Inc., Idaho; Inland Power & Light Company, Washington; Kootenai Electric Cooperative, Inc., Idaho; Lane Electric Cooperative, Inc., Oregon; Lincoln Electric Cooperative, Washington; Lost River Electric Cooperative, Inc., Idaho; Lower Valley Power & Light, Inc., Wyoming; Midstate Electric Cooperative, Inc., Oregon; Missoula Electric Cooperative, Inc., Montana; Nespelem Valley Electric Cooperative, Inc., Washington; Northern Lights, Inc., Montana; Ohop Mutual Light Company, Washington; Okanogan County Electric Cooperative, Inc., Washington; Orcas Power & Light Company, Washington;

Parkland Light & Water Company, Washington; Prairie Power Cooperative, Inc., Idaho; Raft River Rural Electric Cooperative, Inc., Idaho; Pavelli County Electric Cooperative, Inc., Montana; Rural Electric Company, Idaho; Salem Electric, Oregon; Salem River Electric Cooperative, Inc., Idaho; Tanner Electric, Washington; Umatilla Electric Cooperative Association, Oregon; Unity Light and Power Company, Washington; Vigilante Electric Cooperative, Inc., Montana; Wasco Electric Cooperative, Inc., Washington; Wells Rural Electric Company, Nevada; and West Electric Cooperative, Inc., Oregon.

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

Fredric Haberman, et al.,

Petitioners,

v.

Chemical Bank and Washington
Public Power Supply System, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

Petitioners Fredric Haberman, et al., conditionally petition this Court for a writ of certiorari to the Supreme Court of the State of Washington. Only if this Court grants the writ of certiorari in No. 84-1258, Chemical Bank and Washington Public Power Supply System v.

Public Utility District No. 1 of Benton County, Washington, et al. (Feb. 4, 1985), do petitioners Haberman, et al., seek review in this Court.

OPINIONS BELOW

The decision of the Supreme Court of Washington denying intervention to petitioners is reported at 102 Wash.2d 874 (1984) and is set forth in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Washington was issued November 6, 1984. Petitioners timely filed a motion for reconsideration, which was denied on December 17, 1984. See Appendix B. This Court has jurisdiction to review the decision of the Supreme Court of Washington under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The following provision is pertinent to this case: section 1 of the Fourteenth Amendment to the U.S. Constitution, set forth in Appendix C.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners Haberman, et al., are six present and former bondholders acting in a representative capacity, who sought to intervene in Chemical Bank v. Washington Public Power Supply System, 102 Wash.2d 874 (1984) (Chemical Bank II), App. A. They timely sought intervention when it became clear that Chemical Bank, the bond trustee, had adopted legal positions that through operation of the law of res judicata and collateral estoppel could jeopardize the interests of petitioners. The Supreme Court of Washington denied petitioners

leave to intervene and reaffirmed that ruling when it denied petitioners' motion for clarification and reconsideration. See App. B.

Petitioners, together with 144 other individuals and 65 institutions with claims aggregating more than $100 million, are pursuing relief in the Superior Court of Washington for King County through a second amended complaint, leave for which to file was recently granted. By this complaint, petitioners have alleged inter alia violations of Washington state securities laws, equitable causes of action arising under state law, and derivative claims of negligence and professional malpractice against the accountants and other professionals involved in the engineering, construction, and financing of two nuclear generating plants.

Haberman, et al. v. Washington Public Power Supply System, et al., and Chemical Bank, No. 84-2-06452-8.1/

Because petitioners Haberman, et al., have other avenues of relief available to them -- the Haberman lawsuit in state court -- petitioners initially did not intend to seek review of the Washington State Supreme Court's denial of intervention.2/ If this Court grants the writ to Chemical Bank in Chemical Bank and Washington Public Power Supply System v. Public Utility District No. 1 of Benton County, Washington, et al.,

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1/ United States Trust Co. and American Express with claims totalling approximately $340,000,000 have been granted leave to intervene.

2/ Petitioners are also members of the plaintiff class in In re Washington Public Power Supply System Securities Litigation, MDL 551.

No. 84-1258 (Feb. 4, 1985), petitioners respectfully request that the Court also grant the writ to petitioners. Clearly the denial of intervention merits review by this Court.

First, the Washington State Supreme Court's denial of leave to intervene constitutes an abridgement of the fundamental right protected by the Fourteenth Amendment: the right to be heard in a court of law with respect to the adjudication of claims affecting property interests. Second, Chemical Bank has not represented and cannot represent the interests of all current and former of the bonds in this case. Third, if the Court chooses to hear the Chemical Bank case, it ought to have before it all the legal interests that this litigation concerns.

BACKGROUND

In brief, the history of this case begins in the early 1970's, when public utility experts forecast the need for substantially greater electrical generating capacity in the Pacific Northwest. To develop new electrical generating capacity, public utilities joined together to form the Washington Public Power Supply System, a "joint operating agency" under Washington State law. The Supply System consists of 23 Washington municipalities, 20 of which were participants in the projects at issue in this case. App. A, 10a - 12a.

Five nuclear power plants were formed, each financed through the sale of bonds. The bonds for projects 1, 2, and 3 were effectively guaranteed by the Bonneville Power Administration, which financed the projects through a net

billing arrangement. The bonds for projects 1, 2, and 3 are not in default and are not relevant to this case.

Changes in the law effectively prohibited Bonneville Power from supporting projects 4 and 5. Instead, these projects were financed through a provision -- commonly called a "dry hole" agreement -- which obligated the participants to guarantee payment on the bonds regardless of whether projects 4 or 5 were ever completed. Based on the contractual security of these guarantees, memorialized in "Participants' Agreements," bonds for projects 4 and 5 were sold in 14 issues beginning in 1977 and ending in April 1981. App. A, 19a. Projects 4 and 5 encountered enormous cost overruns and delays. In addition, demand for electricity never reached the level forecast. Construction of the

power plants ended in May 1981. The Supply System formally terminated projects 4 and 5 on January 22, 1982. Id.

In May 1982, before the declaration of default on the bonds for projects 4 and 5, Chemical Bank filed a complaint in King County Superior Court, seeking a declaration that the participants in the Supply System remained liable for payment of the bonds under their "dry hole" commitments. App. A, 19a - 20a. Chemical Bank's authority to sue to enforce the Participants' Agreement arose from provisions contained in Bond Resolution 890, the instrument that inter alia sets forth the rights and obligations of bondholders, on the one hand, and the bond trustee -- Chemical Bank -- on the other. The state trial court granted Chemical Bank's motion for

summary judgment, holding that the Washington participants had authority to enter into the Participants' Agreement and could be held liable for payment of debt service on the bonds in the event of default by WPPSS.3/ Id.

The participants appealed directly to the Washington State Supreme Court, bypassing the intermediate appellate court. The Washington State Supreme Court reversed. Chemical Bank v. Washington Public Power Supply System, 99 Wash.2d 722 (1983). The court held that the Washington municipalities had acted ultra vires in entering the Participants' Agreements and agreeing to the "dry hole" provision.4/

3/ The court reserved for trial certain affirmative defenses raised by the participants.

4/ The Idaho Supreme Court reached a similar conclusion in Asson v. City

[Footnote continued]

On remand to the trial court, Chemical Bank and WPPSS raised a variety of legal and equitable claims under state law, for example, restitution and estoppel, seeking to bar enforcement of the Supreme Court's ultra vires holding with respect to the Participants' Agreement. It also raised federal constitutional challenges. On August 11, 1983, and September 16, 1983, the trial court rejected all challenges and granted summary judgment on behalf of all participants dismissing Chemical Bank's declaratory judgment action. App. A, 21a - 23a. Two points merit special emphasis.

[Continued from previous page]

of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, 105 S. Ct. 219 (1984). But see DeFazio v. Washington Public Power Supply System, 296 Or. 550, 679 P.2d 1316 (1984).

First, when Chemical Bank brought its suit in May 1982, the bonds were not in default. And under the Bond Resolution, Chemical Bank had complete authority -- unchallenged by petitioners -- to enforce the Participants' Agreement "in the shoes" of WPPSS. Second, in aid of this authority and at the request of WPPSS and with the active support of the participants, the state trial court entered a restraining order which expressly enjoined all "entities presently or hereafter owning any bonds" from seeking a declaration of default of the bonds and from "exercising any remedies upon any such default. . . ." This restraining order was not lifted by the trial court until July 22, 1983. Although the prospective default was announced at an October 4, 1983 public meeting of former and present

bondholders at the Felt Forum in New York City, actual default on the bonds actually occurred on January 3, 1984, when Chemical Bank refused to honor payment of interest coupons.

Chemical Bank again appealed the trial court's decision directly to the Washington State Supreme Court. Petitioners Haberman, et al., filed their motion to intervene and a draft complaint in intervention with the Washington State Supreme Court on January 19, 1984, just two weeks after actual default when their right under Bond Resolution 890 to intervene had ripened. The express purpose of the intervention was to protect the interests of current and former bondholders, which as a practical matter were not being adequately represented by Chemical Bank. Petitioners sought remand of the

case back to the trial court so that a factual record of petitioners' legal and equitable claims could be developed. The State Supreme Court granted petitioners' motion to participate in oral argument.

On November 6, 1984, the Washington State Supreme Court issued its decision affirming the trial court's grant of summary judgment against Chemical Bank and WPPSS and in favor of the participants. Chemical Bank v. Washington Public Power Supply System, 102 Wash.2d 874 (1984), App. A. The court reiterated its earlier decision that the participants had acted ultra vires in entering into the Participants' Agreement.

In deciding this issue, the court also denied the motion to intervene filed by petitioners Haberman, et al.

The court based its decision on two grounds. First, it concluded that the proposed intervention was untimely because it was not sought "until this action reached the late stages of the appellate process." App. A, 30a. Second, the court held that in any event, petitioners had no right to intervene because the "interested parties have a designated representative," Chemical Bank, which has "vigorously pressed the bondholders' claims." App. A, 31a - 33a. (emphasis in the original).

As the Washington State Supreme Court itself recognized, to deny intervention to petitioners required the court to ignore the plain language of RCW 7.24.110 which has no timeliness requirement and to reverse its decision in Williams v. Poulsbo Rural Tel. Ass'n,

87 Wash.2d 636, 555 P.2d 1173 (1976), which held that the failure to make interested persons parties in a declaratory judgment action is a jurisdictional defect. App. A, 28a - 29a.

Petitioners filed a timely motion for clarification and reconsideration, which was denied by the Washington State Supreme Court on December 17, 1984. App. B.

REASONS FOR GRANTING THE WRIT

Fundamental to any notion of due process of law is the right to be heard in any legal proceeding that affects a person's liberty or property. The right to be heard has been articulated on numerous occasions by this Court, perhaps most powerfully in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950): "Many

controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case."

To be sure, adequate representation by a legal surrogate may provide the opportunity to be heard required by due process. "It is familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . or where . . . the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

However, "it is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), and Hansberry v. Lee, supra). Under Hansberry, a person affected by a litigation, but not represented or inadequately represented by its parties, has a due process right to intervene in the suit. See Bolden v. Pennsylvania State Police, 578 F.2d 912, 919 (3d Cir. 1978).

The Washington State Supreme Court denied intervention to petitioners on two grounds: the application to intervene was untimely, App. A, 30a, and

Chemical Bank as Bond Trustee was the "designated representative" of all bondholders under the Bond Resolution. App. A, 31a (emphasis in the original). Neither holding can withstand due process scrutiny.

First, prior to the court's decision in this case, neither the Washington state statutes nor case law imposed a timeliness requirement for a motion to intervene. To the contrary, the failure to make an interested person a party in a declaratory judgment action was a jurisdictional defect. Williams v. Poulsbo Rural Tel. Ass'n, 87 Wash.2d 636, 555 P.2d 1173 (1976). Thus, failure to join an interested party required remand. Id. In order to hold petitioners' motion to intervene untimely, the Washington State Supreme Court was required to overrule the Williams

decision. This the court expressly did. App. A, 28a - 29a & n.4.

A newly announced procedural rule cannot constitute adequate and independent state grounds sufficient to defeat Supreme Court review of due process claims. As this Court stated in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958), "such a local procedural rule, although it may now appear in retrospect to form a part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their

federal constitutional rights."

(Emphasis added.)

In any event, petitioners Haberman, et al., filed their motion to intervene as soon as practical under the circumstances. As noted above, when Chemical Bank filed its complaint for declaratory judgment in this action, the bonds were not in default. Under the Bond Resolution, Chemical Bank as Bond Trustee had exclusive authority to enforce the Participants' Agreement. In aid of this authority and at the request of WPPSS, the trial court on May 27, 1983, entered a restraining order which expressly enjoined all "entities presently or hereafter owning any bonds" from seeking a declaration of default of the bonds and from "exercising any remedies upon any such default. . . ." This restraining order was not lifted by

the trial court until July 22, 1983. The trial court's orders dismissing Chemical Bank's declaratory judgment suit occurred on August 11 and September 16, 1983. At that time the case was again directly appealed to the Washington Supreme Court. Moreover, although the prospective default was announced at the October 4, 1983 public meeting of former and present bondholders at the Felt Forum in New York City, the first default on the bonds actually occurred on January 3, 1984, when Chemical Bank refused to honor payment of interest coupons. Petitioners filed their motion to intervene on January 19, 1984, just two weeks after default. Their motion to intervene was filed as quickly as practicable under the circumstances and was thus "timely" by any due process standard.

The second ground for the Washington State Supreme Court's denial of intervention -- that Chemical Bank was the representative of petitioners, App. A, 31a -- is also constitutionally insufficient. Petitioners do not dispute that Chemical Bank acted properly in attempting to enforce the Participants' Agreement by standing "in the shoes" of WPPSS. However, there can be little doubt that Chemical Bank does not and could not adequately represent the interests of petitioners.

First, because Chemical Bank brought suit against the participants "in the shoes" of WPPSS, defenses may be asserted against it under Washington law that could not be asserted against bondholders who are holders in due course. E.g., Royce v. Public Utility Dist. No. 1 of Clark County, 26 Wash.2d

733, 175 P.2d 624 (1946). Moreover, because it does not itself hold bonds, Chemical Bank could not bring before the Washington courts all the causes of action available to bondholders. For example, Chemical Bank does not have standing to assert the bondholders' securities claims. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); see also In re Equity Funding Corporation of America Securities Litigation, 603 F.2d 1353 (9th Cir. 1979).

Chemical Bank is authorized under the Bond Resolution to represent only current bondholders.5/ Petitioners

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5/ Paradoxically, if the only available remedy were enforcement of the Participants' Agreement -- the relief Chemical Bank seeks -- only current holders of bonds would recover, a group that as the dissenting opinion in this case observes includes a substantial

[Footnote continued]

include both present and former bondholders. Chemical Bank cannot possibly represent former bondholders. These persons therefore are now unrepresented in this suit and never have been represented.

Second, Chemical Bank operates under a serious conflict of interest. To the extent that the Bond Trustee is functioning as a quasi-trustee in reorganization for projects 4 and 5, it may represent only WPPSS. It cannot bring

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[Continued from previous page]

number of speculators who purchased bonds after June 15, 1983, when the Washington State Supreme Court decided Chemical Bank I. See App. A, 163a - 166a. By contrast, the Haberman action in state court and MDL 551 in federal court seek recovery for a broader group of investors, which includes those who purchased bonds before June 15, 1983, and then sold them at great loss after the participants repudiated their promise to pay debt service on the bonds.

an action on the part of any persons or entities other than WPPSS. See Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416 (1972); Rochelle v. Marine Midland Grace Trust Co. of New York, 535 F.2d 523 (9th Cir. 1976). Indeed, Chemical Bank was appointed Bond Trustee not by the bondholders whom it professes to represent, nor by a disinterested third party. Rather, WPPSS, the issuer of the bonds, appointed Chemical Bank under section 7.1 of the Bond Resolution and pays its compensation. Bond Resolution, § 7.9. Whether or not Chemical Bank has refrained from suing certain parties as a result of its conflict, it has not litigated this action as a representative is required. For instance, Chemical Bank has not brought suit against the professional engineers involved in the projects, who also were

appointed by respondent WPPSS. Id. § 8.1. Such conflicts belie the "good faith" required to find a trustee an adequate representative of its beneficiary. See Hansberry v. Lee, supra; Kersh Lake Drainage District v. Johnson, 309 U.S. 484, 491 (1940).

The Washington State Supreme Court's denial of intervention to petitioners goes to the heart of due process. This Court has clear authority to review the Washington State Supreme Court's denial of intervention. E.g., Local 283, International Union of United Automobile Workers of America v. Scofield, 382 U.S. 205, 209 (1965). The Court should grant the writ in order to allow petitioners their day in court: the relief petitioners sought in the Washington Supreme Court.

Conclusion

For the reasons stated, the Court should grant the writ of certiorari if it grants the writ in No. 84-1258, Chemical Bank and Washington Public Power Supply System v. Public Utility District No. 1 of Benton County, Washington, et al.

Respectfully submitted,

Myer Feldman
Counsel of Record

Robert L. Deitz
Edward J. Tolchin
Ginsburg, Feldman and Bress, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioners

March 7, 1985

[additional counsel on next page]

Of Counsel:

Robert H. Jaffe
Jaffee & Schlesinger, P.A.
8 Mountain Avenue
Springfield, New Jersey 07081

Christopher Lane
David R. Lord
Ferguson & Burdell
29th Floor
One Union Square
Seattle, Washington 98101

Ernest C. Matthews, IV
Thoreson, Yost, Berry &
Matthews
825 Peoples National Bank Bldg.
1415 Fifth Avenue
Seattle, Washington 98171